No. 86-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHRIST THE KING REGIONAL HIGH SCHOOL,

Petitioner,

vs.

EDWARD R. CULVERT, Individually and as Chairman of the New York State Labor Relations Board, JOHN J. FANNING, Individually and as a member of the New York State Labor Relations Board, NEW YORK STATE LABOR RELATIONS BOARD,

—and—

LAY FACULTY ASSOCIATION, LOCAL 1261, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondents.

STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

Petitioner Christ the King Regional High School seeks review of an order of the United States Court of Appeals for the Second Circuit dated March 26, 1987, which affirmed a judgment of the United States District Court for the Southern District of New York denying petitioner's motion for summary judgment, granting respondents' cross-motion for summary judgment and dismissing the complaint. In its complaint, petitioner alleged that the assertion of jurisdiction by the New York State Labor

Relations Board (SLRB) over the lay teachers employed by petitioner, a church-affiliated school, (1) violates the religion clauses of the First Amendment of the United States Constitution and (2) is preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA). The Second Circuit held that the NLRA does not preempt the SLRB from exercising jurisdiction over petitioner and that the district court should have abstained from deciding the first amendment claim. In its petition to this Court, petitioner challenges only the Second Circuit's determination that the NLRA does not preempt the SLRB from exercising jurisdiction.[1] As will be shown, the petition should be denied because under the decisions of this Court, the NLRB clearly does not have jurisdiction over church-affiliated schools. There is, therefore, no "special" or "important" reason within Supreme Court Rule 17(1) for granting a writ of certiorari.

STATEMENT OF THE CASE

A. *Background*

Respondent New York State Labor Relations Board administers the New York State Labor Relations Act, New York Labor Law, Art. 20, §§ 700-717 (SLRA or the Act) and, pursuant to its authority under § 702(7) of the SLRA, adopts rules and regulations for the purpose of carrying out the mandates of the Act. When the SLRA was originally enacted in 1937, its provisions applied to most employees in New York State but not to employees of charitable, educational or religious associations or corporations.[2] In 1968, however, § 715 of the Act was amended to bring these employees within its coverage.[3]

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[1] Petitioner does not advance in this Court the first amendment claim raised below and, despite its reservation of the issue, Petition at 12n.6, implicitly concedes the argument. Petition at 21; see *infra* at 11-12 n. 13.

[2] 1937 N.Y. Laws, ch. 433, effective July 1, 1937.

[3] 1968 N.Y. Laws, ch. 890, effective April 1, 1969.

Petitioner Christ the King Regional High School is a secondary school affiliated with the Roman Catholic Church.[4] (A-3).[5] The school is located in Queens, New York and has an enrollment of approximately 1800 students. (A-20). The school employs both religious and lay teachers and both secular and religious subjects are taught there.[6] (A-20).

Respondent Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (LFA) is the designated representative of the bargaining unit, which consists of petitioner's lay teachers and its varsity basketball coach. (J.A. 159).[7] The LFA was selected by a majority of the bargaining unit in or before September 1976. (R. 159). Thereafter, petitioner and the LFA entered into a series of negotiations which resulted in three separate collective bargaining agreements. (J.A. 159).

The last collective bargaining agreement between petitioner and the LFA expired in 1981. (A-4). At the beginning of the 1981-1982 school year, the lay teachers went on strike. (A-4). The striking teachers were discharged and have not worked at Christ the King Regional High School since.

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[4] In 1976, the Roman Catholic Diocese of Brooklyn entered into an agreement with the school conveying title to the property "so long as the grantee [the school] continued the operation of a Roman Catholic high school upon the premises." (Petition at 4).

[5] "A. ____" refers to the Appendix annexed to the Petition.

[6] Petitioner employs lay teachers without regard to their religion, except for teachers who are specifically hired to teach religion courses. (A-4). Almost ninety percent of the teachers employed by petitioner are lay teachers. (A-4).

[7] "J.A. ____" refers to the Joint Appendix submitted to the United States Court of Appeals for the Second Circuit.

B. *Proceedings Before The National Labor Relations Board*

Between August 1979 and May 1982, the LFA filed four unfair labor practice charges against the petitioner with the National Labor Relations Board (NLRB). (A-4). The charges alleged that petitioner had (1) refused to provide the LFA with a copy of its pension plan, (2) promulgated a calendar establishing the days of work for the 1979-80 school year without consulting the LFA, (3) failed to provide the LFA with a list of the names, addresses and salaries of the members of the bargaining unit, and (4) unlawfully terminated striking teachers and refused to negotiate with the LFA. (A-4). The first three charges were settled. (A-4). The last charge was withdrawn by the LFA and a similar charge was later filed by the LFA with the SLRB and became the subject of this action. (A-4).

C. *Proceedings Before The SLRB*

On January 28, 1982, the LFA filed an unfair labor practice charge with the SLRB. (A-5). The charge alleged that petitioner had engaged in unfair labor practices within the meaning of the SLRA by (1) refusing to negotiate with the LFA "for a collective bargaining agreement to succeed the one which expired on August 31, 1981" and (2) discharging striking members of the LFA for joining the Union and participating in union activities. (A-5). Thereafter, on February 18, 1982, each of the 73 teachers who were discharged filed individual charges against petitioner. (A-5). The content of each charge was basically the same as that contained in the original charge filed in January. (A-5).

On February 25, 1982, the SLRB commenced an informal, confidential investigation of the unfair labor practice charges filed by the LFA. (A-5). The sole purpose of the investigation was to determine whether the LFA had a *prima facie* case and the investigation was thus limited to ascertaining whether there was reason to believe (1) that petitioner had failed to bargain in good faith with the LFA and (2) that the lay teachers had been discharged due to their union affiliation. (A-23). The investigators made no attempt to inquire into or interfere with

religious beliefs, teachings, expressions, practices or other activities and no issues involving religion arose during the investigation. (R. 118-119).

As part of the investigation, on February 25, 1982, petitioner and the LFA attended a conference before the SLRB. (A-5). The purpose of the conference was to ascertain the positions of the parties concerning the unfair labor practice charges. (A-5). Petitioner, however, refused to discuss the merits of the charges at the conference, claiming (1) that the assertion of jurisdiction by the SLRB over petitioner would violate the First Amendment of the United States Constitution and (2) that jurisdiction by the SLRB was preempted by the National Labor Relations Act. (A-5).

On March 12, 1982, petitioner filed a memorandum formally setting forth this position and urging the Labor Relations Examiner to recommend to the SLRB that it not issue an unfair labor practice complaint. Shortly thereafter, the LFA submitted an answering memorandum. (A-5, J.A. 119).

After the investigation and after considering the memoranda filed by petitioner and the LFA, the SLRB decided to issue an unfair labor practice complaint. (A-5). This decision was based on the SLRB's determinations (1) that it was not precluded from exercising jurisdiction over petitioner and (2) that there was a *prima facie* case based on the LFA's unfair labor practice charges. On October 29, 1982, the SLRB issued and served the unfair labor practice complaint on petitioner. (A-5,6). The complaint covered all of the charges filed against the petitioner with the exception of thirteen charges which were withdrawn by the LFA because the individual teachers involved showed no interest in pursuing them. (J.A. 120). Along with the complaint, the SLRB served a notice scheduling a pre-hearing conference for December 7, 1982 and a notice scheduling the hearing for December 17, 1982. (A-6).

On December 1, 1982, petitioner made a motion before the SLRB requesting an order dismissing its complaint on the ground that the NLRA preempted the SLRB from exercising jurisdiction

over petitioner. (A-6). Petitioner reiterated this objection at the pre-hearing conference held on December 7, 1982 and, after the conference, brought another motion to adjourn the hearing scheduled before the SLRB. (A-6, J.A. 21).

On December 10, 1982, before the SLRB had issued its decisions on the motions, petitioner commenced this action in federal district court. (A-6). In its complaint, petitioner alleged that the SLRB's assertion of jurisdiction over its lay teachers violated the religion clauses of the First Amendment of the United States Constitution and was preempted by the NLRA. (J.A. 9).

Thereafter, by order dated January 6, 1983, the SLRB denied petitioner's motion to dismiss the SLRB's complaint but postponed the SLRB hearing pending a determination of this action by the United States District Court for the Southern District of New York. (A-6).

D. *Proceedings In The District Court*

In the district court, petitioner moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The state defendants (the SLRB, Edward R. Culvert, Chariman of the SLRB[8], and John J. Fanning, a member of the SLRB) cross-moved for summary judgment and the LFA joined in the state defendants' cross-motion. By decision and order dated September 30, 1986, the district court (Hon. Vincent L. Broderick) denied petitioner's motion for summary judgment, granted respondents' cross-motion and dismissed the complaint.

At the outset, Judge Broderick stated that the court "should abstain from deciding the First Amendment issues" raised in this case under the authority of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986) (*Dayton*) "if a request for such abstention has been duly

[8] John J. Fanning has been Chairman of the SLRB since August, 1983.

presented". (A-20). Judge Broderick determined, however, that although the SLRB had raised abstention in its answer and in a letter to the court concerning the *Dayton* case, the abstention issue had not been "urged in the argument with respect to these motions." (A-20).

On the merits, Judge Broderick held that the first amendment and preemption issues raised by petitioner were "identical" to those raised in *Catholic High School Association of the Archdiocese of New York v. Culvert*, 753 F.2d 1161 (2d Cir. 1985). (A-39, 44). He therefore held that under that decision of the Second Circuit, the NLRA does not preempt, and the first amendment does not bar, the SLRB from exercising jurisdiction over petitioner. (A-44).

Pursuant to Judge Broderick's decision and order, judgment was entered on October 9, 1986 dismissing petitioner's complaint. By Notice of Appeal dated November 6, 1986, petitioner appealed to the United States Court of Appeals for the Second Circuit.

E. *Decision Of The United States Court Of Appeals For The Second Circuit*

On appeal, the Second Circuit affirmed the judgment of the district court, holding that the NLRA does not preempt the SLRB from exercising jurisdiction over church-affiliated schools. Relying on this Court's opinion in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (*Catholic Bishop*), the court wrote:

> In *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979), the Supreme Court stated that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the [NLRB]" such teachers are not within the jurisdiction of the NLRB. Since the Supreme Court has held that the NLRA does not cover teachers in church-operated schools, we conclude that

> states are not preempted from regulating teachers in these schools.

(A-8).

The Second Circuit ruled also that the district court should have abstained from deciding the first amendment issues raised by the petitioner. The Court held that the abstention issue "was properly before the district court" as it had been raised by the SLRB both in its answer and in its letter memorandum to the court concerning the *Dayton* case. (A-10,11).

The Second Circuit then relied on this Court's decision in *Dayton* and held that "a federal court should not enjoin a pending state administrative proceeding when important state interests are involved, as long as the federal plaintiff will have a full and fair opportunity to litigate constitutional claims during or after the proceedings. (A-12). Applying the *Dayton* decision to this case, the Second Circuit found that: (1) the SLRB had not yet conducted its hearing, (2) the state's regulation of the duty to bargain collectively is an "important state interest", and (3) the petitioner would have a full and fair opportunity to litigate its constitutional claims both before the SLRB and in the state courts after the SLRB issues its decision. (A-13, 14). Based on this analysis, the court concluded that the district court should have abstained from deciding the first amendment issues. (A-14).

In its petition, the petitioner, relying exclusively on an argument that *Dayton* "abnegates" *Catholic Bishop*[9], requests that this Court grant certiorari to review the Second Circuit's decision regarding the preemption issue.

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[9] This argument was not raised by petitioner in either the district court or in the Second Circuit. *See infra* at 11-12 n.13. In all but exceptional circumstances, which are not present here, this Court has declined to address arguments not raised below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970).

ARGUMENT

Petitioner asks this Court to grant certiorari to determine whether the NLRA preempts the SLRB from exercising jurisdiction over petitioner, a church-affiliated school. As will be shown, this issue does not merit review by this Court. In *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that the NLRB does not have jurisdiction over church-operated[10] schools.[11] Accordingly, there is no preemption in this area and the states are free to exercise their jurisdiction. *See Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746-50 (1942).

In *Catholic Bishop*, this Court stated that if the NLRB's exercise of jurisdiction would give rise to "serious constitutional questions", there must be a "clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." 440 U.S. at 501, 504. The Court then held that "serious constitutional questions" would in fact arise from an application of the NLRA to lay teachers. *Id.* at 504. It concluded that the NLRB lacked jurisdiction over church-operated schools because:

> Our examination of the statute [NLRA] and its legislative history indicates that Congress simply gave no consideration to church-operated schools.[12]

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[10] Petitioner concedes, for purposes of this petition, that it is "church-operated" within the meaning of *Catholic Bishop* even though it is operated by a lay board of trustees. (Petition, at 14-15 n. 8). Its concession is well-founded. *See NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 823 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Nazareth Regional High School*, 283 NLRB No. 116 (1987).

[11] In *Nazareth Regional High School*, 283 NLRB No. 116 (1987), the NLRB itself held that *Catholic Bishop* precludes the NLRB from exercising jurisdiction over church-affiliated schools.

[12] The *Catholic Bishop* decision does not, however, preclude the SLRB from exercising jurisdiction. There has been a "clear expression of an affirmative

(Footnote Continued)

Petitioner argues that this Court's decision in *Ohio Civil Rights Commission v. Dayton Christian Schools*, ____U.S.____, 106 S.Ct. 2718 (1986) implicitly overrules *Catholic Bishop*. As will be shown, *Dayton* and *Catholic Bishop* are not contradictory and *Dayton* cannot be construed to confer the NLRB with jurisdiction over church-affiliated schools.

In *Dayton*, Dayton Christian Schools, Inc., a private elementary and secondary school which required its teachers to be born-again Christians, brought an action against the Ohio Civil Rights Commission. Dayton sought to enjoin the Commission from exercising jurisdiction over a sex discrimination complaint brought by a discharged teacher, claiming that the Commission's exercise of jurisdiction would violate the first amendment.

This Court held that the federal courts must abstain from interfering with the pending state administrative proceeding since important state interests were involved and the federal plaintiff would have a full and fair opportunity to litigate its first amendment claims during or after the proceedings. With respect to Dayton's claim that the hearing held by the Commission would itself pose first amendment concerns, this Court held:

> [N]either the investigation of certain charges nor the conduct of a hearing on those charges is prohibited by the First Amendment: "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."

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intention" by the New York Legislature to include church-affiliated schools within the scope of the Act. See supra at 2; McKinney's 1968 N.Y Session Laws at 2389 (Governor's memorandum approving 1968 N.Y. Laws, ch. 890). Thus, applying the test set forth in *Catholic Bishop*, the SLRB can exercise jurisdiction over church-affiliated schools. Moreover, as the Second Circuit ruled, because *Catholic Bishop* precludes the NLRB from exercising jurisdiction over these schools, the SLRB is not preempted from exercising its jurisdiction. (A-9)

106 S. Ct. at 2724; *accord*, *id.* at 2725-2726 (Stevens, J. concurring).

Petitioner invokes *Dayton* in a unique and totally unsupportable manner. Petitioner's argument is essentially as follows: 1) In *Dayton*, this Court found that the Ohio Civil Rights Commission, an administrative agency, would not violate the constitutional rights of a religious school by investigating charges or conducting a hearing (Petition at 17-20); 2) because no constitutional rights are violated when an administrative agency investigates charges or holds a hearing, the NLRB's investigation or conduct of a hearing concerning the unfair labor practice charges filed by the LFA against petitioner Christ the King Regional High School would not raise any "serious constitutional questions" (Petition at 22-24); 3) because there are no "serious constitutional questions" involved in investigating charges or holding a hearing, there is no need under the reasoning set forth in *Catholic Bishop* for "a clear expression of affirmative intention by Congress that teachers in church-operated schools should be covered by the Act" (Petition at 27-28); 4) because there is no need for "a clear expression of affirmative intention by Congress" after this Court's decision in *Dayton*, *Dayton* confers jurisdiction on the NLRB over church-affiliated schools despite the direct contrary holding of *Catholic Bishop* (Petition at 27); and 5) because the NLRB has jurisdiction over church-affiliated schools, the SLRB is preempted from exercising its jurisdiction (Petition, p. 27).[13]

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[13] It is ironic that petitioner now contends that *Dayton Christian* "removes as an obstacle...the supposedly imminent danger of First Amendment infringement resulting from an NLRB investigation and hearing. . . ." Petition at 27. Point I of the petitioner's brief in the Second Circuit was entitled "The District Court Erred by Refusing to Find That The SLRB's Assertion of Jurisdiction Over Christ The King Violates Both The Free Exercise and Establishment Clauses of The First Amendment." That point, which covered twenty five of thirty six pages of argument in petitioner's brief, was premised upon *Catholic Bishop*, 440 U.S. at 501-504, and the contention that "[t]he analysis in *Catholic Bishop* is equally compelling [with respect to SLRB jurisdiction]. Brief for Plaintiff-Appellant at 15. Petitioner's brief not only was

(Footnote Continued)

This reasoning is severely flawed. The Court's construction of the NLRA in *Catholic Bishop* rested upon the cardinal principal that when it is fairly possible to construe a statute so as to avoid the need to address a constitutional challenge, the Court will opt for the saving construction. *See Heckler v. Mathews*, 465 U.S. 728, 741-744 (1984); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This principle, like other rules that this Court has established to ensure that constitutional questions are resolved only when absolutely necessary, is based in part upon a "[d]ue respect for the Legislative Branch [which] requires that we exercise our power to strike down its enactments sparingly". *Lowe v. SEC*, 472 U.S. 181, 212 (1984) (White, J., concurring). But it arises as well from a presumption that when Congress enacts a statute, it does not intend an arguably unconstitutional construction. One of the "ultimate foundations" of the policy of avoiding unnecessary constitutional adjudication is "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

This Court's determination in *Catholic Bishop* that the NLRA does not cover church-operated schools was thus not simply a means of avoiding the need to pass upon, and possibly strike down, an act passed by a co-equal branch of government; it was a matter of discerning Congress' intent by refusing, in the absence of affirmative evidence, to attribute to Congress an intention to pass an arguably unconstitutional statute. Subsequent developments, such as this court's decision in *Dayton*, could not possibly have effected Congress' view, when it enacted the NLRA, of the constitutionality of subjecting church-operated schools to coverage under the Act. Thus, even if it could be said that *Dayton* resolved the difficult constitutional questions

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written after *Dayton* was decided but expressly cited to it in discussing abstention. *Id.* at 31.

It is equally ironic, in light of petitioner's contention that *Dayton* eliminates any serious argument that the First Amendment is a bar to NLRB jurisdiction, that petitioner seeks to reserve its First Amendment claim. Petition at 12 n.6.

posed in *Catholic Bishop, Dayton* clearly did not undermine the *Catholic Bishop* Court's determination of what Congress contemplated when it enacted the NLRA.

Moreover, as this Court has frequently stated, once this Court construes a statute, there is a heavy presumption of the continued validity of the Court's interpretation. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 106 S. Ct. 1922, 1928 (1986); *Miller v. Fenton*, 106 S. Ct. 445, 452 (1985). "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). These considerations are not nullified even where "contemporary considerations" support a new construction of the statute. *Miller v. Fenton*, 106 S. Ct. at 452. Thus, in light of Congress' refusal to amend the statute after *Catholic Bishop*, there is no basis for re-visiting the question of whether the NLRA covers church-operated schools.

Furthermore, as petitioner concedes, the *Dayton* decision only addressed the hearing and investigative stages of the NLRB's proceedings. In *Catholic Bishop*, this Court found that "serious constitutional questions" would be raised not only by an assertion of jurisdiction at the investigative and hearing stages but also due to "the conclusions that may be reached by the Board." 440 U.S. at 502. Thus, even applying petitioner's reasoning, the NLRB would lack jurisdiction because the sanctions that may be imposed by the Board raise "serious constitutional questions" and there is no "clear expression of affirmative intention" to include church-operated schools within the scope of the Act.

In this case, the Second Circuit held that the NLRA does not preempt the SLRB from exercising jurisdiction over church-affiliated schools and that the federal courts should abstain from deciding the First Amendment issues while the SLRB's proceedings are pending. These holdings are directly supported by this Court's decisions in *Catholic Bishop* and *Dayton* and, as has been shown, petitioner's argument concerning a conflict between the *Dayton* and *Catholic Bishop* decisions is without

merit. Under these circumstances, there is no "special" or "important" reason for this Court to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 28, 1987

Respectfully submitted,

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